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No. 85-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, *Petitioner*,
v.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

Underlying each of the questions presented in the petition is Petitioner's contention that a federal bankruptcy court, as affirmed by a district court and court of appeals, should not be permitted to arrogate to itself the power to hold a reorganized enterprise in tutelage on the strength of a purported retention of jurisdiction in a plan of reorganization, especially where clear and unambiguous decisional and statutory law prohibit such a usurpation of power. In a predictable and formulaic fashion, Respondent has attempted to render this contention—resting, as it does, on core principles of limited judicial power, respect for congressional enactments, and harmony with the national bankruptcy policy—as fact-specific, as "turn[ing]

in significant part upon the unique factual and procedural circumstances of the cases below." (Brief in Opposition at 10.) Respondent's arguments in support of its position are unavailing, as demonstrated in this brief Reply.

1. Respondent contends that the decisions below were based on a factually unique plan of reorganization and confirmation order, thus rendering the issues "academic or episodic" and inappropriate for this Court's review. (Brief in Opposition at 11-12.) To support this conclusion, Respondent relies on one case involving a woman's claim for damages because a cemetery refused to bury her husband, *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), and on what Chief Justice Taft termed "an ordinary patent" case involving an apparatus for drawing water from deep wells, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). The present case is about an important feature of the developing national bankruptcy policy, not about burial rights or well water. At issue is an unresolved tension in the law that resonates not only through the present litigation but also through other judicial decisions, *e.g., In re Flatbush Ave.—Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943) ("Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . , have power to remain a wet-nurse to the reorganized company. [It] cannot obtain that power merely by inserting a provision reserving jurisdiction."); through academic commentaries, *e.g.*, 6A *Collier on Bankruptcy*, ¶ 11.20 at 315 (14th ed. 1977) ("court lacks power to keep the reorganized enterprise in tutelage"); Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 769 (1984) ("corporation can obtain repeated discharge"); and, at the risk of belaboring the obvious, through *successive* congressional enactments, 11 U.S.C. §§ 727(a), 1141(d); 11 U.S.C. § 32c(5) (repealed). In an age in which, as a society, we

apparently expect our bankruptcy courts to adjust enormous social and economic cleavages such as the asbestos tragedy and the restructuring of the domestic steel industry, it is difficult to imagine a less fact-specific set of issues than those presented in the instant petition.

2. Respondent persists in its attempt to characterize this as a case in which Petitioner has sought to avail itself of rights under the Code that did not exist under the Act,[1] thus triggering the applicability of Section 403(a) of the 1978 Reform Act. This is simply untrue. Both the Act, 11 U.S.C. § 32c(5) (repealed), and the Code, 11 U.S.C. §§ 727(a), 1141(d), contain provisions that unequivocally ground Petitioner's right to engage in successive bankruptcy proceedings consistent with the "six year rule." Hence, even if one were to accept Respondent's argument that the present proceeding should be governed by the now-repealed Act—a result that Petitioner would not resist if only the Act could be resurrected—the identical issues would be joined. By their contortions of this Court's decision in *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982), Respondent and the Eleventh Circuit afford Petitioner the protection of *neither* the Code *nor* the Act. With respect, Petitioner does not read *Geiger* to disenfranchise a bankruptcy debtor from *both* statutes. Section 403(a), on which *Geiger* relies, is a transition provision, not a weapon by which creditors simultaneously strip a debtor of rights under both statutes.

3. Respondent maintains that the decisions below are correct. (Brief in Opposition at 14-18.) In doing so, however, Respondent revealingly departs from its earlier and

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[1]Consistent with the Petition, the Bankruptcy Act of 1898, as amended, will be referred to in this Reply as the "Act," and the Bankruptcy Reform Act of 1978, which replaced the Act, will be referred to as the "Code."

self-serving characterization of the case as fact-specific. No longer is this a case about a unique plan of reorganization and confirmation order. Now, according to Respondent, the case involves the "clear" rule of law that "the pendency of a bankruptcy case proscribes the filing of subsequent petitions seeking discharge of the same debts and involving the same property." (Brief in Opposition at 16.) This rule of law, of course, is neither clear nor fact-specific, as evidenced by Respondent's reliance on an otherwise inapposite sixty-one-year-old decision of this Court, *Freshman v. Atkins*, 269 U.S. 121 (1925),[2] which, although brought to the lower court's attention by Respondent, was not cited by the Court of Appeals in either decision for which review is sought.

4. Finally, Respondent contends that there is no conflict with decisions in other circuits. Indeed, says Respon-

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[2]The vintage of this case cited by Respondent demonstrates the pedigree, importance, and recurring nature of the issues presented in the petition, as does Petitioner's reliance on the forty-three-year-old case of *Flatbush Ave.*, which Respondent openly ridicules based on its age. (Brief in Opposition at 16.) The problem with Respondent's reliance on *Freshman* is not its age, but the fact that (a) the case stands for the opposite of how Respondent portrays it since the Court there did *not* dismiss the second bankruptcy proceeding on jurisdictional grounds but rather allowed the second proceeding to continue; (b) the first proceeding in *Freshman* resulted in no final action, unlike the first proceeding here; (c) the first proceeding in *Freshman* resulted in *no* discharge while, consistent with the statutory six-year rule's requirement that the first proceeding result in *a* discharge, the first proceeding here did result in a massive discharge and reorganization; (d) *Freshman*, by definition, involved no post-discharge debts requiring a new proceeding, whereas Petitioner has incurred debts subsequent to its first discharge; and, perhaps most revealingly, (e) the statutory provision on which *Freshman* was premised was repealed in 1938. As to the last point, Respondent's discussion of *Freshman* ignores the basic distinction between the debtor's bankruptcy case and his application for discharge, which, in accordance with the provision repealed in 1938, was merely an ancillary proceeding within the case.

dent, two other circuits have reached "the same conclusion" as the Eleventh Circuit here. (Brief in Opposition at 17.) The cases relied on by Respondent with such apparent assurance deserve a moment's scrutiny. Respondent cites *In re Springpark Associates*, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980). Yet this case involved a first bankruptcy proceeding commenced in February 1976; a "settlement agreement" on refinancing between the debtor and creditor allowing the debtor to emerge from bankruptcy; a subsequent violation of the settlement agreement by the debtor; and a second bankruptcy proceeding commenced on December 30, 1976, as to which the court lifted the Bankruptcy Act's automatic stay. Unlike the present case, *Springpark* involved *no* dismissal of the second proceeding on jurisdictional grounds; *no* application of the six-year rule; and *no* purported retention of jurisdiction by the bankruptcy court. The cited case is so factually and procedurally distinct from the present one that it offers no support whatsoever for Respondent.

Even wider of the mark is *In re Tilco, Inc.*, 558 F.2d 1369 (10th Cir. 1977), which Respondent says reaches "the same conclusion" as the decisions below. However, *Tilco* does not even involve a second bankruptcy filing. The case concerns whether, by way of a retention of jurisdiction in a plan of reorganization, a bankruptcy court can authorize a trustee to reject executory contracts. To extrapolate from these facts the principle that a retention of jurisdiction suffices, contrary to both the Act and the Code, to nullify a reorganized enterprise's right to commence a second bankruptcy proceeding is to reveal the inadequacy of Respondent's position.

Petitioner contends that the decisions below flatly contradict a number of federal court decisions discussed at pages 15-19 of the Petition. *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960); *In re Flatbush Ave.—Nevins St.*

Corp., 133 F.2d 760, 762 (2d Cir. 1943); *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F.2d 299, 303 (2d Cir. 1942); *In re Hale*, 274 F. Supp. 813 (W.D. Va. 1967); *Indiana National Bank v. Lones*, 50 Bankr. 801 (Bankr. W.D. Ky. 1985). In response, Respondent asserts weakly that *Guardian Mortgage Investors v. Unofficial Noteholders-Debentureholders Creditors Committee*, 607 F.2d 1020 (2d Cir. 1979), establishes the absence of a conflict with the Second Circuit. (Brief in Opposition at 16.) Once again, the cited case is far afield. *Guardian Mortgage* involved the proper line of demarcation between the jurisdictional reach, respectively, of the Bankruptcy Act and of the Securities Exchange Act of 1934. The case involved the proper jurisdictional basis for a suit brought by a debtor-in-possession against certain creditors over the contents of solicitation materials. It involved *no* second bankruptcy proceeding; *no* six-year rule implications; *no* retention of jurisdiction by a bankruptcy court in a plan of reorganization; and *no* decision on a bankruptcy court's power to deny a discharge based on equitable grounds that are contrary to the clear terms of the governing statute. It hardly requires mention that the asserted conflicts easily survive Respondent's critique.[3]

[3]Similarly, the earlier Second Circuit decision cited by Respondent, *Prudence-Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F.2d 525 (2d Cir. 1951), has no bearing on the present case. It involved post-confirmation jurisdiction to alter a plan of reorganization, which, in fact, the Second Circuit said should be exercised sparingly, that is, only when the "circumstances peremptorily demand it." *Id.* at 528.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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